THE BAKKE PROBLEM -- ALLOCATION OF SCARCE RESOURCES IN EDUCATION AND OTHER AREAS

"Whenever many apply and few are chosen, individual pain is inescapable, but the way is open for processes that do not automatically pit one race or class against another." 

The Supreme Court has spoken, as so often these days, with many voices. It is fortunate that it is so, for the pervasive problems it raises in the field of education can perhaps be most accurately described as philosophical or social problems, not necessarily resolvable by anything in the Constitution or by the decisions of the Court.

Much has been written about the Bakke case, both before and since the Court's pronouncement. I do not propose to review these writings, or even to examine the opinions of the Court in any detail. It is enough, and fortunate, I think, that we are able to continue the essentially social process of experimentation in this area, knowing that race may be taken into account in academic admissions, but that quotas based on a two-track system are invalid. We should not forget, though, that Justice Powell, who is the only member of the Court who clearly agrees with all
aspects of this conclusion, recognized that "an admissions program which considers race only as one factor" may be only "a subtle and more sophisticated -- but no less effective -- means of according racial preference . . ." The difference is largely one of emphasis and approach, which also reflects the fact that we are dealing with what is essentially a social problem. But quotas are inherently invidious, even when their purpose is benign. Consideration of race as one factor is not much different, and we must not forget that when we follow the Bakke problem in the years ahead. But it may be enough different, simply as a matter of approach, so that we can properly proceed along that line, and we do know that a rather complicatedly constructed majority of five members of the Supreme Court has said that we can travel down that road. Yet it remains a narrow road, with precipices on each side, and experimentation must be thoughtfully constructed and carefully carried out, with its results more thoroughly evaluated than has perhaps been the case in the past.

In some aspects of our society, when dealing with the allocation of scarce resources, we rely on the market place, which acts in economic terms on the basis of the law of supply and demand. Gold is a scarce commodity, and it is allocated at the price which those who want it and have the means are
willing to pay. I have not yet heard of any "affirmative action" program with respect to gold. We could, I suppose, use the same method for allocating places in institutions of higher education. I have not heard of any one who thinks that that would be a wise or effective course to follow.

The tradition of financial aid for students in schools of higher education is of long standing. Although we have not achieved full equality of opportunity as far as financial need is concerned, we have gone far down the road which enables any person who has adequate intellectual qualifications to obtain an advanced education regardless of his financial need.

II

What then is the difference between gold and other items which we allocate through the market place, and education and other benefits where some other form of allocation is thought to be relevant, and has traditionally been used? I suppose that the underlying distinction, often not clearly articulated, is that with respect to education, and some other areas, we are dealing with what is essentially a social problem, where human factors are rightly relevant. This is surely part of the clue to the difference between quotas and affirmative action.
Speaking in human or social terms, there are several factors which merit consideration. In the first place, with respect to professional schools, including law and medicine, a strong case can be made for the "mix." The presence of blacks and other minorities in a class of students can be supposed to be advantageous in at least two ways. (1) It can be thought to be a part of the educational process to have variety and diversity in the student body. In this way members of the class can meet, and be acquainted with, and sometimes be friends with, members of different backgrounds. In sharing approaches and reactions they can contribute to the common educational process, so that all members of the class can go into the outside world with a broader background and increased understanding. And (2), the presence of increased numbers of students from minority groups will help the educational institution to meet its perceived obligation to train and introduce into society an increased number of professional practitioners who will be available to serve members of their own communities. For the time being, at least, in the light of past discrimination, it is felt that many black clients or patients may be better served, or may think they will be better served, by black lawyers or doctors — though at the same time we look askance at the suggestion that white clients or patients can properly prefer to have white lawyers.
or doctors. That, indeed, is discrimination, or racism. We are truly in the midst of the modern stage of the American dilemma -- which, despite its difficulties, real and theoretical, is surely an improvement over the situation about which Gunnar Myrdal wrote some forty years ago.

Another factor in favor of taking race into account in the matter of admission to professional schools is the fact that unless we do, for the time being, at least, very few members of certain minority groups will be admitted into the professions, and thus be made available to meet the needs which are felt on behalf of the minority communities. This problem was strikingly stated in two of the many briefs which were filed with the Supreme Court in the Bakke case. One of these was filed by the deans of the four State-supported law schools in California. The other was filed on behalf of the Association of American Law Schools, and was written by an excellent committee of faculty members in member schools.
The California deans included a number of striking tables in their brief, based on actual experience at the law school at Berkeley over the years through 1976 when the brief was prepared. At the outset, they contended that without "special admissions" programs the consequences would be "the near total exclusion of minority groups and their continued token representation in the bar" of California.

They pointed out that in 1970 there were 355,242 lawyers in the United States, of whom only 3,845 were black, or scarcely more than 1%. And they added that the number of Chicano, or Mexican-American lawyers was far smaller both in absolute numbers, and in relation to population percentages. Without special consideration, they contended, "the movement of minority groups toward meaningful representation in the profession . . . will virtually cease."

On what did they base this unhappy prediction? The figures, alas, are clear. In the past ten years, there has been an enormous increase in application to law schools (and to medical schools). As a result, when conventional tests are used, only persons with very high scores can be admitted at many schools. There are a large number of applicants who have scores which indicate that they could successfully complete the work of the law school, but only the top fifth -- or at least in some law schools, the top tenth -- can be accepted. Unfortunately,
for better or for worse, very few minority students are in the top group. The fact was, at Berkeley, during the three years 1974, 1975 and 1976, there were 8,042 white applicants, of whom 4,126, or 51%, had PGA's (Predicted Grade Averages, based on a combination of college records and scores on the Law School Admissions Test) of 75 and above. On this basis virtually no blacks or Chicanos would have been admitted. Yet under "affirmative action," or "special admissions," 86% of the blacks and Chicanos having PGA's of 75 or above were admitted, but only 33% of the whites, while, of those below 75%, 26% of the blacks and Chicanos were admitted, but only 3% of the whites.

As the California deans said, what termination of special admissions "implies in terms of the vertical integration of American society, assertion of legal rights on behalf of minority groups, and access to the political process requires no elaboration..." They pointed out that any effort to deal with the problem in terms of "disadvantaged" students requires exceedingly difficult problems in defining who is "disadvantaged," and would, in any event, require ignoring the basic disadvantage which all our history shows has been most significant in producing the present situation. Even the expedient of taking all of the applicants who meet the minimum qualifications and drawing their names from a hat would produce only a relatively small
increase in the number of minority students, since the number of minority applicants, in terms of minority percentage of the total population is smaller than the corresponding percentage of white applicants -- and the number of white applicants could be expected to increase very greatly under such a system because of the large amount of self-selection which is now present in white applications to many American law schools.

The brief filed for the Association of American Law Schools fully reinforced the position of the California law school deans. It showed under one of its headings that "The Use of Race as a Factor in the Admissions Process Is Necessary If There Are To Be a Substantial Number of Minority Students in Law School." It pointed out that in 1964, there were only 700 black students in all the accredited law schools of the country -- 1.3% of the total enrollment of more than 54,265 -- and 267 of them, more than a third, were enrolled in what then were essentially segregated black schools. With the development of special admissions programs, this situation changed so that in the fall of 1976, a total of 1700 black, and 500 Chicano students, were admitted. They represented 4.9% and 1.3%, respectively, of the total of 43,000 students who were admitted that year. A careful and thorough study made of 1976 admissions to law schools by F. Evans on behalf of the Law School Admissions Council showed that without the special admissions programs, "the nation's two largest racial minorities, representing nearly 14% of the population would have had at most a 2.3% representation in the
nation's law schools and, more likely, no more than about 17/18.

How could this result be? It goes back to one of the basic underlying facts with which we must wrestle in this whole area. Before proceeding further, I would like to make it plain that we know of no precise measure of "intelligence"; indeed, we have no very precise or generally accepted definition of that term. Nor do we have any clear definition of "success at the bar," or of what makes a "useful and constructive" practicing lawyer." Over the past thirty years, we have developed a predictive test of "success in law school," in terms of the law school grades likely to be achieved by the applicant. This is a combination of the score on the Law School Admission Test, and the applicant's grade point average based on his college grades. No other method of law school admission is as effective in predicting success in law school as this one is. Better results are not achieved by personal interviews, by letters of recommendation, by lot, or otherwise. We also know, as a result of five separate carefully-conducted studies that these measures are not racially biased, and that they do not underpredict the law school performance of blacks or of Mexican-Americans.
With this background about the tests, we encounter "The ineradicable fact," as put in the A.A.L.S. brief "that, as a group, minorities in the pool of law school applicants achieve dramatically lower LSAT scores and GPAs than whites." In specific terms, 20% of white and unidentified applicants, but only 1% of blacks, and 4% of Chicanos receive both an LSAT score of 600 or above and a GPA of 3.25 or higher. Similarly, if the combined LSAT/GPA levels are set at 500 and 2.75, respectively, 60% of the white and unidentified candidates would be included, but only 11% of the blacks and 23% of the Chicanos. The effect of this, under a race-blind system would inevitably be to curtail sharply the number of blacks and Chicanos admitted to law school. Specifically, if all applicants were assigned an index number based on the two widely used predictive tests, the number of blacks in the top 40,000 -- which was the number admitted to law schools that year -- would have been 370 on one formula and 410 on the other. The equivalent figures for Chicanos are 225 and 250. And the schools to which these blacks and Chicanos would have been admitted are predominantly the least selective law schools in the country. These are, generally speaking, schools which lack financial resources, including funds for financial aid to students. As a result, a high percentage of minority students would, for financial reasons, be unable to attend the only schools to which they could gain admission.
As a result, the A.A.L.S. brief contended, "the number of black and Chicano students enrolled in the first-year class in 1976 would have been approximately 1% of the entering class, roughly the same as in 1964. The progress of a decade would have been wiped out." On a race-blind basis, "12 of the nation's most selective law schools, which during 1975 had total minority enrollment of approximately 1,250, nearly 15% of the national total, would have enrolled 'no more than a handful of minority students.'" Isn't there some other way? Both the California Supreme Court in Bakke, and Justice Douglas in his dissent in the DeFunis case, have contended that substantial minority enrollments in professional schools can be maintained without using admission criteria based on race. To this, the A.A.L.S. brief replied:

If there are means by which that can be done, they are not known to the law schools. We do know, however, that none of those suggested would work. None would permit the enrollment of minority students in numbers even close to those that now exist and some would, in addition, have a destructive effect upon the quality of legal education and of the profession, requiring law schools to admit students -- white and black -- who are less qualified to study law than students now being admitted.
All of these matters, including the inadequacy of any known alternatives, could be discussed in greater detail. If we start with the premise that we ought to have more black and other minority lawyers and doctors, that there ought to be greater opportunities for blacks and other minorities to enter the professions, both because of past discrimination, and because, for the time being, there is a social need in the black and other minority communities for professional people who share their background and problems, then we are forced to the conclusion, I think, that we cannot accomplish this result by proceeding on a race-blind basis. Consequently, largely for the reasons so well advanced in the A.A.L.S. brief, I support the Bakke judgment in reversing the California Supreme court's conclusion that admission to public professional schools must be on a race-blind basis.

III

At the same time, I do not like quotas in admissions, and at least I understand the reasons why there are serious concerns about quotas. No matter how you look at it, the admission system at the medical school of the University of California at Davis was a quota system. There were sixteen places out of 100 which were reserved for minority students; and the system was clearly a two-track system, with the minority applicants
being considered on a different basis, and by a separate group of admissions officers, without any comparison on any basis with the non-minority applicants whose admission followed the regular track. Consequently, I am persuaded by Justice Powell, and the four other members of the Court who were with him on this issue, that the admissions system actually before the Court in the Bakke case was bad and that Bakke had been illegally discriminated against because of the purely numerical system, which, by preventing his being compared in any way with the minority applicants, resulted in his being denied admission to the medical school.

What is the difference between a quota, such as that involved in the Davis admissions plan, and an over-all consideration of all of the applicants, taking into account "all relevant factors," such as was apparently approved by the judgment in the Bakke case? Not much. It is clearly a difference of degree, and "none the worse for it," as Holmes observed many years ago. It is a question of approach or emphasis. I do not think that it can be mathematically, or logically, demonstrated that one way is bad and the other is good, particularly when it is clear that many of the factors which are relevant in any admissions system are not quantifiable, are not capable of being put in any sort of a scale, and weighed one against the other in any conclusive fashion. It should be remembered, too, that in many -- if not
most -- professional schools, after you select the top applicants, who are clearly admissible on any basis, there is next a large group of applicants whose numerical predictors -- test scores and GPAs -- are not much different from each other, often not different enough to have any statistical significance. It is at this point that other factors can have a wholly legitimate role, to affect the mix in the class, to give recognition and weight to factors of background, experience, interest, and maturity, which may contribute to the educational process of the group, and which may point to the possibility that a particular applicant may have potentiality for greater service to the community than another who lacks his personal background or qualities. These factors may well be relevant over a considerable spread in the numerical predictors, as long as all persons selected are of a caliber so that the predictors show that they have a high probability of successfully completing the work of the professional school. But there remains a serious risk.

IV

Thus, on all of its conclusions, I support the opinion of Justice Powell, and the judgment of the Court. You will note that in reaching this point, I have cited no cases or other legal authorities. I have not even quoted the equal protection clause, or any other part of the Constitution, or Title VI of the Civil Rights Act of 1964. This is because, as I said at the beginning, I think of the question as primarily a philosophical and social
question, and hardly a legal question at all. Indeed, I do not think that there is anything in the Constitution that really says anything very much about it. Yes, I know there is the equal protection clause, but that has never been regarded as requiring mathematical equality, or as preventing differential actions from being taken on grounds which at the time are considered as rational.

If the question presented by Bakke is not a legal question, what was it doing in court? As de Tocqueville observed a century and a half ago, we have a tendency, sometimes unfortunate, to throw all questions into court. The mere fact that an issue presents essentially a social and philosophical question, not really covered by anything in the Constitution, has never kept our courts from considering it. Hours of labor, minimum wage, child labor and abortion may be cited as examples.

If a more substantial support for my conclusion is thought to be needed, it can be found, I believe, in the long and troubled history in this part of North America, from the first landing of blacks in Virginia in 1619, through the slave codes on the one hand, and the abolitionists on the other. We did have a great civil war, which, though ostensibly fought to "save the Union," would never have occurred if the country had not been torn by the social, economic, and moral questions of slavery. The war
was resolved on the battlefield, and this resolution was put into our fundamental law by the Thirteenth, Fourteenth, and Fifteenth Amendments. Then came a century of relative quiescence, while we waited too long to make the Amendments effective, and took steps to perpetuate the social and economic deficiencies with the excuse that we had resolved the moral question. The way out of this period of stagnation has been led by the Supreme Court, relying heavily on the equal protection clause of the Fourteenth Amendment, aided by some delayed, but important, federal legislation.

Of course, a legal basis must exist for any court decision. In this instance, it seems to me that it can be readily found in the Fourteenth Amendment, in the light of its history, and the total history of our country. Though the problem is and remains a social, economic, and moral problem, we have deliberately constructed our fundamental law so as to make it possible for courts to deal with it. This is surely true, it seems to me, as far as blacks are concerned. Perhaps the same reasoning can be applied to Indians, or Native Americans. The history with respect to other groups, such as Chicanos (Spanish Americans, or Puerto Ricans) may well be different. They, or their ancestors, were not brought here against their will, or held as slaves. But some of the same factors may be relevant there, enough so that it
is not easy to draw an adequate line between them and others whom the Fourteenth Amendment was clearly intended to protect.

In his dissent in the DeFunis case, Justice Douglas spoke eloquently when he said:

The purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans, and not to place First Amendment barriers against anyone.

This is surely an ideal towards which we should aspire, and towards which we must move. As far as many segments of the public are concerned, we have made great strides in that direction, not through homogenizing all the people in the great American melting pot, as some sought to do in the early part of this century, but by greater understanding, and greater common acceptance of persons of widely different ethnic background - as long as they came from Europe, and not Asia or Africa. But we still have a long way to go with respect to other elements of our population. The success we have achieved in some areas leaves room for hope that we can bring about improvements with respect to the more difficult problems. But we cannot do so unless we provide real practical equality of opportunity to qualified members of the racially disadvantaged groups. This is what the Bakke case and the Fourteenth Amendment are all about.
Having come out in support of the Bakke judgment, basically on social and moral grounds, but with, I believe, an adequate legal foundation, I will now say that it leaves me with a feeling of profound unease. I have a disturbing doubt of whether I am a do-gooder who undertakes to intervene in the lives of other people because it gives me satisfaction to feel that I am disposing of some of the world's largess in a way that I think will be useful. Some say that taking such action is simply a means of assuaging our own guilt feelings. I do not think that is a correct analysis. As far as I can tell, I do not have a fundamental guilt feeling in this area, though I have surely had some failings. Talk about guilt feelings in terms of the wrongs done in the seventeenth, eighteenth and nineteenth centuries seems to me to be nothing but a massive charge of guilt by long-range and highly attenuated association. By our present standards, there were grave abuses in those days; but no one now living owned a slave, or engaged in the slave trade, or acted on the basis that the Negro "had no rights which the white man was bound to respect." The problem is with us, and we -- all of us -- surely have responsibilities. I think that we should do what we can to meet those responsibilities because the problem is a social problem, and we are all members of society, and not because of any guilt feelings.
There is a related aspect to the problem, though, which gives me considerable concern. It is good to do good, but who bears the burden? When I was dean of a law school, we had serious admissions problems, because there were far more applicants than we could accept. One of the functions of the dean is to receive pressure in such cases, and to resist it as wisely and courteously as he can. Some of the pressure came from good alumni of the school who had sons or daughters whom they wanted to have admitted. These situations could be very appealing. Most of the alumni were reasonably understanding about it, but all were hurt when an adverse decision was made. I found that the way that I could hold the line and keep myself from too much distress was by recognizing that when you have a limited number of places, the admission of any one person means that some other well-qualified person will be excluded. It was hard to tell the alumnus that we could not take his son. It would have been harder to tell the next man on the list, better qualified by hypothesis than the son of the alumnus, that we could not take him because we were taking the alumnus' son.

In the Bakke case, that man is Bakke. But for the unfortunate way in which the admissions program at Davis was set up -- with a quota, and a separate admissions track -- Bakke would have been denied admission in order to admit a minority applicant. And, in the future, under the Bakke decision,
various well-qualified applicants will be excluded because other applicants have qualities, such as blackness, or a Spanish surname, which are thought by admissions committees to make them more eligible for acceptance. It is impossible to say that Bakke was himself guilty of any injustice to other applicants. It is equally hard to say that others who will be excluded in the future under the rule approved by the judgment in the Bakke case had been guilty of any injustice to those who are accepted. It is only by seeing that we are dealing with a social and moral problem, made particularly intense by our long history of discrimination, that I can bring myself to accept what would have been the injustice to Bakke if he had not been eventually admitted, and what has been, or will be, the injustice to other applicants who have been excluded from many schools which have followed more skillfully prepared plans of selective admission than the one which was utilized at Davis. Professor William Van Alstyne puts this question strikingly. He says:

In brief, the Davis plan as an engine for amortizing the national racial debt is a zero sum game which arbitrarily disadvantages a few whites very greatly indeed and no one else at all; a system of transfer payments enforced at the gates of a state university medical school . . . . The system of racial transfer payments is perfectly calculated to dissipate its entire impact on otherwise "marginal" white applicants, i.e., those from circumstances least profiting from the antecedent racism in America and among the least able to pay that debt.
Apart from this individual burden, it should be observed, too, that there is an inherent element of invidiousness in any affirmative action program, no matter how carefully it is prepared or sincerely advanced. For the time being, I think that this can be justified, but it does warrant a note of caution. Racism will not wholly cease until the time comes when we can ignore race when we allocate scarce resources.

My unease also derives from another ground, which adds to my concern. Our society is moving in one way or another towards an egalitarianism which is more rigid than we have thought wise in the past, and this may be particularly true in the field of education. In the past, the commonly accepted standard has been "equality of opportunity," with the expectation that "excellence" is the ultimate objective, and that our society will be so arranged that it will, in normal course, provide encouragement for superior achievement. Along with this is a large element of noblesse oblige under which the more successful are given opportunities, in various ways, to aid the less successful, and are expected to use these opportunities at least to a reasonable extent. It has long been our experience and expectation that a relatively few members of the society will provide most of the innovation, most of the ideas, most of the
initiative, most of the motive power and leadership, which are necessary for the sound development of our social and economic systems, and that persons who have these qualities should be encouraged.

In recent years, though, education, and many other aspects of society have been moving or drifting towards that sort of absolute equality which we call egalitarianism. In elementary schools, children do what they want, instead of what will draw them out, and lead them to an awareness that they have greater capabilities than they realize. In colleges and universities, we have pass-fail, and the absence of requirements, and there are many other trends of this sort.

The problems in this area have been thoroughly explored by Arthur M. Okun in his book on Equality and Efficiency: The Big Trade Off, and in his subsequent article on "Further Thoughts on Equality and Efficiency," Mr. Okun's survey shows, as I think we have all come to see in recent years, that greater equality leads almost inevitably to lower efficiency, or decreased excellence.

How far is this involved in the Bakke problem? There is no way to be sure, but I find that I cannot escape the feeling that it is involved, and probably to a significant extent. Under the judgment in the Bakke case, which, as I have said, I favor
and accept, I feel that there will be some reduction of average standards, perhaps an appreciable reduction. This is a price which we have to pay, but I think that it is of some importance that we recognize that we are paying that price, and that, over the years, we do what we can to restore the highest standards in education that we can maintain. Hopefully, as more minorities enter the mainstream of American professional life through the doorway of the Bakke case, they will successfully meet new challenges, and devise new roads for innovation and new means of leadership. In the long run, the provision of greater "equality of opportunity" through the Bakke decision need not result in the deadening absolute of egalitarianism. But there is a risk; and we must watch.

VII Other situations

The Bakke problem has been discussed principally in terms of admissions, because that is the field in which it, and its forerunner, the DeFunis case, arose. There are, however, other situations presenting aspects of the question of the extent to which race may be a factor in allocating scarce resources.

 Probably the closest problem is that of financial aid to education, that is, the granting of preferences in the award of scholarships and other financial aid. Experience shows that most
persons admitted under a special admissions program are not able to avail themselves of the opportunity if they have to rely on their own financing. Accepting the Bakke judgment, the question then arises how far may race be taken into account in allocating financial aid, which, at virtually every institution, is a scarce resource. Here, as with respect to admission itself, we must recall that every dollar of financial aid made available to one student means that there will be that much less available for one or more others.

This problem was presented in the case of Flanagan v. President and Directors of Georgetown College. The plaintiff there was a white student, who successfully contended that he had been discriminated against in violation of Sections 601 and 602 of the Civil Rights Act of 1964, when Georgetown established an affirmative action program of financial aid. Under this program 60% of available financial aid was allocated to minority students. The term "minority" was defined rather broadly to include persons with educational, social, and cultural disadvantages, and could be applied to white students. The result was, though, that in the plaintiff's case, he was awarded $400 while many black applicants in similar financial circumstances were awarded $2500 in financial aid. As indicated, the court held that this program was discriminatory, and contrary to the statute. Following this
decision as to liability, Georgetown settled the case with the plaintiff, so no appellate decision became available. It should be noted, too, that this was before the Bakke decision, where only four members of the Supreme Court felt that the Civil Rights Act was applicable.

There are, or have been, a number of federally funded grants which are specifically designated for minority or disadvantaged persons. These include the funds made available to the Council on Legal Opportunity, and the Graduate and Professional Opportunities Fellowships. Since these were provided by Congress, it seems clear that they do not violate Title VI. No one, as far as I know, has suggested that they are subject to any constitutional infirmity.

Apart from admissions itself, and financial aid, expenditures have sometimes been made by educational institutions on what might be called a differential (or, indeed, discriminatory) basis. For example, special programs have been developed by public institutions, and by private institutions which in one way or another receive public support, which are designed to recruit minority students. Indeed, the Supreme Court of California, in its Bakke decision, suggested such special efforts at recruitment as one of the means which might be followed by a state educational institution. It
can hardly be contended that such programs and expenditures have always been race color-blind. Desirable as they may be, it seems likely that they should be carefully scrutinized, and care should be taken to make sure that they are broad enough to cover a fairly wide spectrum of disadvantaged students. The same may be said with respect to special programs, such as tutoring and counselling, which an institution may make available to its students. Confining these to a fairly narrow group may have a stigmatizing effect. Though the matter is analytically close to the Bakke problem, it can be readily avoided by the exercise of reasonable care in seeing that these services are made available to all students who have need of them. 43/

Another case in the field of education gets us into sex discrimination and employment. As employment is the subject of another session in this series, I shall make only brief reference to it. This is the case of Cramer v. Virginia Commonwealth University. 44/ The plaintiff there was a white faculty member. He received a temporary appointment in the Department of Sociology and Anthropology. During the year of his appointment, he applied for promotion to either one of two regular positions. A total of 385 applications were received by the University for these two positions, of which 57 were from female applicants and 328 were received from males. In the selection process, the files of the
applicants deemed qualified were first pulled out. Then these files were divided into three groups: females, minority males, and white males. Only applications in the female pile received further consideration; only they were interviewed for the two vacant positions; and two females were eventually appointed. In taking this action the department appointment committee was clearly influenced by the "goals and timetables" provision of Executive Order 11246, as made applicable to sex in 1967, and by the corresponding Executive Order No. 29 issued by the Governor of Virginia. Acting under the Virginia Executive Order, the Board of Visitors of the University had promulgated "the Affirmative Action Program of Virginia Commonwealth University" on November 15, 1973.

The court held that the plaintiff had been wrongfully discriminated against, in violation of the United States Constitution and the provisions of Title VII of the Civil Rights Act. It should be noted, of course, that this was prior to the Bakke decision. Indeed, on August 15, 1978, the Fourth Circuit Court of Appeals vacated the order of the district court, and remanded the case for further proceedings, without any published opinion. The Civil Rights Division of the U.S. Department of Justice, on behalf of the Secretary of Labor, has now filed a motion to intervene in the case. This is the fifth brief filed
by the Department in affirmative action cases, but the first one involving sex discrimination. Just how the problem stands in the light of the judgment in the Bakke case remains to be seen.

Before proceeding to the next problem, I would like to make brief reference to another employment case -- which may well become the next cause celebre. This is Weber v. Kaiser Aluminum and Chemical Co., decided late last year by a panel of the Fifth Circuit Court of Appeals. There, without any showing of prior discrimination, a collectively bargained labor agreement provided that an on-the-job training program should admit minority workers on a one-for-one basis. The court held that this was a quota system which violated the Civil Rights Act, and that, to the extent that the program was carried out in an effort to comply with the "goals and timetables" provision of Executive Order No. 11246, the Executive order would have to yield to the Congressional prohibition against such discrimination. Judge Wisdom filed a long and careful dissent -- all of course prior to the Bakke decision. How this problem will eventually be resolved remains to be seen.

The next problem in this area to which I would like to refer relates to the 10% set aside for minority business, which is provided by the Public Works Compensation Act. This, of course,
provides a quota, and eliminates any necessity for showing prior discrimination by any of the contractors involved. In Rhode Island Chapter of Associated General Contractors v. Kreps, Judge Pettine wrote a long and careful opinion upholding the provision of the statute. The opinion is an important one because it stresses the fact that different considerations may apply in different areas, and that a "quota" in a business area may be upheld when it would not be sustained in the field of education. He said:

Quotas in educational institutions are much more disruptive than goals because they seem to require the substitution of whatever notions of merit prevail at a particular institution with a non-meritorious, indeed suspect, criterion. We need not address that issue here for this case does not involve the disruption of an institution. Nor does it involve divesting those with reasonable expectations for the benefit of others. In the marketplace, no such expectations become firm and there is no accrued right to a government contract, especially to funds only recently made available on an emergency basis. No on-going private institutional arrangements are being disrupted by the use of this quota. The market, not a private institution, is the locus of this remedy.

This suggestion is interesting, but not wholly persuasive. There is no "right" to welfare, but if it is made available, we know that it cannot be on a discriminatory basis. Suppose, for example, the statute involved before Judge Pettine had provided that no contracts would be awarded to blacks. We know that such a
statute would be invalid, and it would not be saved on the ground that "In the market-place, no such expectations become firm and there is no accrued right to a government contract."

With respect to another and important aspect of the problem, Judge Pettine pointed out that whatever may be the powers of state and private parties (as in the Bakke and the Weber cases), "to implement affirmative action remedies without specific findings of discrimination, it is beyond doubt that Congress has that power."

This may well be, in the long run, the key to the problems in this area. As I suggested early in this paper, the problems do not seem to me to be really legal, in anything but a rather narrow and technical sense. They are rather social, philosophical and moral problems of our society, which, insofar as they can be resolved by governmental action -- and I think governmental action is important -- may well be better resolved by legislative action than by the courts. Congress has the power -- certainly as to blacks -- under Section 5 of the Fourteenth Amendment, and it may well be that that Congressional power, and also the power of Congress under the Commerce Clause, extends to other racial minorities as well.
Let me now turn to another area where there has been a considerable, though still rudimentary development which can fairly be denominated as a judicially created affirmative action in the allocation of scarce resources. This is the question of granting of radio and television licenses to competing applicants, and the extent to which race, other minority status, or sex can or must be taken into account by the Federal Communications Commission. There is no Federal statute which mandates or expressly allows "affirmative action" in this area. Must the Commission take these factors into account -- and how -- in going about the delicate task of allocating the nation's scarce radio and television frequencies?

This question apparently first arose in the opinion of Judge Fahy of the Court of Appeals for the District of Columbia Circuit in the case of TV-9, Inc. v. Federal Communications Commission. That case involved competing applications for a construction permit to operate a commercial television station in Orlando, Florida. One of the applicants relied on the fact that two of its owners were local black residents. One of them had a 7.17% voting interest, and the other was a local doctor, with a 7% voting interest. Both lived in the local area, where about 25% of the people were black. Both were directors of the corporation. One of them was to assume the
office of Vice President, and proposed to devote two days a week to the station.

The Commission, through its various layers of review, gave no weight or effect to this black ownership. The Review Board said that black ownership cannot and should not be an independent comparative factor.

The court of appeals reversed this conclusion. It said: "To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act. On this basis, the court concluded that "credit" should be given for the participation of the two black shareholders, and that "merit should be awarded" on their account." In support of these conclusions, it said:

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. 59/

A petition for rehearing en banc was filed. This was denied, but the court wrote a further opinion in which it qualified its statement somewhat. In answer to the contention that its opinion called for a "new comparative policy of awarding preferences
for Black or minority ownership, per se," it said that
"our opinion makes no mention of a preference in this matter."
It continued that "the court determines only that Comint was
entitled to be accorded merit due to the ownership and
participation of Dr. Smith and Mr. Perkins." And it concluded:

However, in view of the nature of the
issues in this case, and the probability
that Black persons having substantial
identification with minority rights will
be able to translate their positions,
though not technically "managerial,"
and their ownership stake, into meaningful
effect on this aspect of station programming,
we think that such material factors residing
in the evidence cannot reasonably be totally
and rigidly excluded from favorable consideration.61/

A petition for certiorari was filed in the Supreme Court, seeking
review of this decision, particularly in the light of the then
pending DeFunis case. The Solicitor General joined in this
petition, but it was denied.

So the case went back to the Federal Communications
Commission, where it now remains, believe it or not, in its
twenty-fifth year. In the further proceedings before the Commission,
a new element appeared. One of the competing claimants relied on
the fact that 33% of its stock was owned by a woman who planned
to spend full time in the operation of the station. The
contention was advanced that a far higher proportion of the
audience in Orlando was made up of women than of blacks, and
that they were entitled to a "merit" more than sufficient to
outweigh the "merit" due to Comint because of its smaller element
of black ownership and participation in the operation of the station. There are other issues in the case, and it is not at all clear what weight will eventually be given to black ownership, or ownership by women, either on an absolute or a comparative basis. It is clear, though, that once minority status of one sort is found to be relevant, the situation can become rather complicated.

This can be illustrated by another decision of the Review Board of the Commission, in the case of Gainesville Media, Inc. This arose out of three mutually exclusive applications for authority to construct a new FM broadcast station in Gainesville, Florida. I will not go into the details. Reference to the case is simply to illustrate the semantic problems which arise in connection with consideration of this sort. On several occasions, the Review Board said that a "credit" or "an important credit" should go to one of the applicants because one of the owners, with a 10% interest, was black. In other places, the Review Board said that "merit" should be awarded for minority ownership, but added that "'merit' meant only favorable consideration or a plus factor, not a 'preference.'" In other places, the Review Board said that "minority ownership was a relevant consideration," and that "favorable consideration" should be given "to an applicant who in good faith gives ownership to a local minority group." Just what is the relevant
weight to be given to "merit," "credit," "preference," and "relevant consideration," or "favorable consideration," is not clear. Perhaps it can be said that problems of this sort -- that is, of the weight to be given to many diverse factors -- are often encountered in comparative decisions before the Federal Communications Commission.

There has been a further development in this area which is relevant, and may prove to be of considerable importance. On January 31, 1978, the Office of Telecommunications Policy in the Executive Office of the President, and the Department of Commerce, jointly filed a formal petition with the Federal Communications Commission seeking to have the Commission adopt a rule which would "establish a policy of promoting ownership of broadcast facilities by minorities, especially in those areas where minorities constitute a significant percentage of the population and have little or no present ownership." For this purpose, the petition filed with the Commission defines "minorities" as including "persons of Black, Hispanic-surnamed, American Indian, Native American, and Asiatic-American extraction." The petition also asserts that "Women, of course, are also included to the extent that they are also within one of the stated minorities." Thus, women as a class are not covered, unless they are minority women. The petition adds: "We do not propose to include women generally because of the potential for defeating the objective of the proposed policy through family stock ownership arrangements."
When the petition was filed, the White House Press Secretary issued a news release summarizing the petition, and announcing that "to ease initial financing problems, the Small Business Administration and the Economic Development Administration have announced rule changes to extend their loan and loan guarantee programs to broadcast and cable facilities." It was added that "both agencies intend minorities to be the major beneficiaries of their rule changes." At the same time, the Department of Commerce put out a news release saying that they had joined in petitioning "the FCC to establish a policy of promoting minority ownership of U.S. broadcast facilities."

The Commission has taken several actions in this area. It established a Minority Ownership Taskforce, which held a conference in April, 1977. That Taskforce put out a Report on May 17, 1978, which the Commission published. On May 25, 1978 the Commission issued a Statement of Policy on Minority Ownership of Broadcasting Facilities, which deals primarily with steps to be taken to facilitate the transfer of interests in radio and television stations to black purchasers. And on November 1, 1978, the Commission announced that it would soon be issuing a response to the petition filed by the National Telecommunications and Information Administration, formerly the Office of Telecommunications Policy, and the Department of Commerce.
There are almost no limits to the areas where similar problems and approaches may be utilized. Any field which is subject to government regulation or inducement may become an occasion for "affirmative action." Consider, for example, the Judicial Selection Commissions which have been established in the past year and a half, and which have an especially important role to fill under recently enacted legislation establishing many new federal judgeships. Recently I heard about a special problem of the allocation of scarce facilities, namely that of landing slots at our most crowded airports, such as LaGuardia Field, National Airport in Washington, O'Hare Airport, and Los Angeles. These, I am told, are now allocated by agreement among the affected airlines. Will priorities have to be given for minority airlines? Indeed, how will we establish minority airlines in a time of deregulation?

CONCLUSION

Apart from the labor field, which is the subject of another lecture in this series, I have tried to give a summary of the possible impact of the Bakke decision on various aspects of education, and in other fields. In the process, I have endeavored to suggest my evaluation of the Bakke decision itself. If this seems rather inconclusive, that does not surprise me, for we are dealing with a movement, with a development in our national
history, with something which transcends the law and lawyers' lucubrations.

Where is the line between "affirmative action" and "quotas"? How far will the implications of the Bakke case spread? Indeed, in view of the ad hoc nature of the ultimate "majorities" in the Bakke decision, how long will that case last? These questions I cannot answer, and I am not much concerned that that is so.

There are some questions with which the Supreme Court deals which are not resolvable in ultimate detail, and, I venture to say, fortunately so. In the Pentagon Papers case, the Court held that there could be no prior restraint on the publication of the particular papers then before it; but a clear majority of the Court refused to say that there could never be prior restraint on publication in the name of national security. Where is the line between freedom of the press and fair trial? We know a number of things about that line, but no one can say precisely where it is. Even everyday questions like negligence and fraud, and the line between tax evasion and tax avoidance have never been finally delineated, and, I would suppose, never will be.
As I said at the beginning of the lecture, the Bakke problem is, in my view, more a social and philosophical and moral question than it is a legal question which lawyers are peculiarly fitted to deal with. This does not deny that there are legal elements in it, nor does it suggest by any means that there is no appropriate role for the courts, especially in the application of any determinations which the legislature, as the authorized spokesman for society, may make. For affirmative action, justice in society, justice for all, is fundamentally a social and political problem. The Bakke decision has performed an important function in bringing this sharply to public attention. Let us get on with the job, being careful in the process to weigh into the scales the new problems which affirmative action itself inevitable creates.
3. Id. at .
5. This is relevant in many ways. There is the waste of talent which results if qualified persons cannot find opportunities. Law and medicine are inevitably involved in politics, in the broad sense, and minority groups will be under-represented in the political process if their members cannot gain admission to the professions. And there are many other social benefits which are dependent on "access to the system."
7. Provost A. Kenneth Pye, and former deans Francis A. Allen and Robert B. McKay signed the brief and Dean Earnest Gellhorn and Professors David E. Feller and Terrance Sandalow were of counsel.
10. Id., p. 4.
11. Id., p. 22.
12. Id., p. 25.
13. Id., p. 4.
15. Id., p. 22.
17. Id., p. 28.
18. Id., p. 8. Nor are the tests sexually biased. Id.

19. Id., p. 28-29.

20. Id., p. 29.

21. Id., p. 31.

22. Id., pp. 31-32.

23. 18 Cal. 2d 34, 553 P. 2d 1152 (1971).


25. Id., p. 32.

26. On this I concur with Mr. Justice Blackmun's statement in his opinion in the Bakke case: "In order to get beyond racism, we must first take account of race." 438 U.S. at 439.

27. Professor Louis Luksky, who disapproves of the Bakke result, trenchantly observes: "It is less than twenty years since covert anti-black discrimination through similar administrative abracadabra formed an effective barrier to implementation of Brown v. Board of Education -- almost to the point of nullification." And he adds, with respect to the construction of the Civil Rights Act of 1964, that "in 1964 the consequence of covert anti-black discrimination through sophisticated administrative 'plans' were too painfully evident to be overlooked or used as a model for civil rights legislation." L. Luksky, "Government by Judiciary: What Price Legitimacy?" 5 Hastings Con. L. Q., No. 4 (Fall, 1978).


29. Cf. the observations of former Under Secretary of Labor Laurence H. Silberman in The Wall Street Journal for August 11, 1977, p. 10. He concluded, with respect to affirmative action in the labor field: "I now realize that the distinction we saw between goals and timetables on the one hand and unconstitutional quotas on the other, was not valid."

31. de Tocqueville, Democracy in America, Pt. I, c. 16:
"Scarcely any political question arises in the United States which is not resolved sooner or later into a judicial question."


It is hard to be sure that the attempt to do good really results in accomplishing something that is really good. See B. Gross, Discrimination in Reverse (1978). Affirmative action may in fact benefit "more privileged blacks, with the unintentional effect of contributing to growing economic-class differences within the black community." W. Williams, "Race and Economics," 53 The Public Interest 147 (1978). A federal study shows that "in certain income categories, a higher proportion of black college-age youth attend college than do their white counterparts." 53 The Public Interest 119-120 (1978).

35. This quotation from Chief Justice Taney's opinion in Dred Scott v. Sanford, 19 Howard 393, 407 (1857), is often quoted, most recently in Higginbotham, In The Matter of Color 6 (1978). It is there correctly noted that Taney was speaking of the situation in 1789, and before, and not of the time of the Court's decision.


37. This is perjoratively called "the intellectual meritocracy" in B. Kimball, "An Historical Perspective on the Constitutional Debate over Affirmative Action Admissions," 7 J. of Law and Education 31, 44 (1978), perhaps indicating a bias which is currently active among professional educators.


42. Bakke v. Regents of the University of California, Cal. 2d, P.2d (1976).
47. Washington Post, November 1, 1978, p. ..
48. 563 F.2d 216 (5th Cir. 1977)
50. Petitions for certiorari have been filed in the Supreme Court, one by the Solicitor General on behalf of the Equal Employment Opportunity Commission, No. 78-436, October Term, 1978.
53. Id. at 352, n.7.
Introduction

A full generation has passed since racially "separate but equal" public schools were constitutionally condemned by a unanimous Supreme Court. During the intervening decades there have been many other race-related Supreme Court decisions, but none as momentous as Brown v. Board of Education. On June 23, 1978, however, a case to rival Brown in the sheer intensity of public interest came down—the case everyone knows simply as "Bakke." The question it decided was whether racially separate and unequal admission standards are also constitutionally condemned. From there on, however, the similarity of Bakke to Brown ends.

The lapse of years between Brown and Bakke is reflected on the face of their very different opinions. In condemning compulsory racial school segregation, Brown spoke with a confident and unanimous simplicity. In retrospect, perhaps it is to be faulted on that account, although I have not seen in all the critiques of Brown a work product overall more effective than the original succinct opinion.

Bakke, on the other hand, is a study in contrast in virtually every imaginable respect. There is a "judgment" for the Court—but no opinion for the Court. Rather, there are six separate opinions, none of any issue representing the view of more than the barest majority. The outcome itself is by bare majority, five-to-four, but even that degree of consensus is deceptive. Four of the five justices on the prevailing side voted to affirm (in favor of Bakke) solely on the basis of a statutory interpretation which all of the other five justices rejected. The fifth Justice on the prevailing side voted to affirm solely on the basis of his own interpretation of the fourteenth amendment which four other justices rejected and which the remaining four justices declined to endorse.

It is thus not inaccurate to say that the Bakke case was "decided" by one Justice (Mr. Justice Powell) on a rationale which, so far as it depended (as it did) on an interpretation of the Constitution, was a minority view of one-to-four; and for what it was "decided" by four Justices on the basis of a statutory interpretation (which it was), it represents a minority view of four-to-five! Small wonder that the immediately ensuing news specials, the evening of June 28th, seemed confusing.

What follows is but a brief résumé of the case in its principal features plus some observations respecting its immediate implications for the academic community.

A Summary of the Case

The University of California opened a new medical school at its Davis campus in 1968. As of 1973, the medical school had established a dual admissions process: one for regular applicants, open to applicants of all races, from whom the best would be selected on the basis of grades, test scores, and interview results, to fill eighty-four places in the freshman class; another for special applicants, limited to blacks, Chicanos, Asians, and American Indians unlikely to be admitted in competition with the regular applicants, from whom the best would be selected on the basis of grades, test scores, and interview results, to fill sixteen places in the freshman class.

A reasonably accurate description of the second admissions process might be to call it a "minimum racial minority set-aside." It was plainly not a maximum racial minority quota, as of course applicants of all races were considered on completely equal terms within the regular admissions process. (In fact, for 1973 and 1974 combined, twenty-four racial minority students [most of whom were Asian] were among the 168 enrolled pursuant to that process—14 per cent of the total. Neither was it exactly a minimum racial minority quota: the medical school was not determined to fill it "at all costs," but only to the extent that those eligible for consideration were deemed capable of coping with the regular curriculum, once admitted. In 1973 and 1974 alike, however, a full complement of sixteen students was admitted in each year pursuant to this second admissions process.

Allan Bakke applied in 1973 and 1974 to be admitted. Whether he would have been admitted but for the 16 per cent racial minority set-aside cannot be known. In
comparison with others admitted under the regular process, he was deemed less qualified—but not at all much less so. Indeed, the university conceded that had he been considered on equal terms with all other applicants for the full complement of 100 places (rather than the lesser complement of 84 places) each year, he might in fact have been among the best 100; i.e., the university conceded that it could not show that even had it not reserved 16 places each year as a separate, racial minority set-aside, Allan Bakke would still have been rejected.

Objectively, moreover, a comparison of Allan Bakke's admittance statistics (exclusive of his interview scores) with the average of the sixteen special admittees for each of the two years in which he was rejected and in which they were all accepted, is striking:

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<tr>
<th>School</th>
<th>GPA</th>
<th>Qualit Soc-Ge-</th>
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<tr>
<td>Bakke</td>
<td>2.92</td>
<td>2.68</td>
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<td>16 Others (av.)</td>
<td>2.88</td>
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<td>Bakke</td>
<td>3.44</td>
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<td>16 Others (av.)</td>
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No other useful comparison can be made between any other qualifications Allan Bakke may (or may not) have had. No such comparison is possible because the Davis Medical School made none and, indeed, arranged its admissions procedures in such a fashion that none could be made. A wholly different committee from that which interviewed each of the sixteen special admits interviewed Allan Bakke; no attempt was made to standardize the interview ratings employed by the different committees—because the special admits were not meant to be compared either "objectively" or "subjectively" with Allan Bakke, but only with each other. (Even as things were, however, applicants admitted under the special program included a significant number whose "bench-mark scores"—inclusive of points added on the strength of information elicited pursuant to the interview process—were "significantly lower" than Allan Bakke's bench-mark score.)

Displaced from admission under these circumstances, Allan Bakke challenged the legality of the school's racial double standards (i.e., the more highly competitive one for all "regular" applicants, the em- phatically less competitive one available only to dis-advantaged blacks, Chicanos, Asians, and American Indians) in a California Superior Court. He did so on three distinct grounds each of which, he alleged, for- bade the unequal treatment to which he had been subjected. The first was the following provision as it appeared (in 1974) in the California Constitution: (Note: shall any citizen, or class of citizens, be granted privi-

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<th>Medical College Admission Test (Percentiles)</th>
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<tr>
<td>Science Overall</td>
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<td>GPA GPA Verbal Soc-Ge- Info.</td>
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<td>1973</td>
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<tr>
<td>Bakke 3.44 3.51 96 94 97 72</td>
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<td>16 Others (av.) 2.62 2.88 44 24 35 35</td>
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<tr>
<td>1974</td>
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<tr>
<td>Bakke 3.44 3.51 96 94 97 72</td>
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<tr>
<td>16 Others (av.) 2.42 2.68 34 50 37 18</td>
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</table>
therefore be affirmed without gratuitous speculation as to whether, in the absence of that controlling Act of Congress, some other applicable law or constitutional provision would require the same result.

The remaining five Justices, however, that the Act of Congress was not conclusive per se. Rather, all of them interpreted Title VI to foreclose only such uses of race as would otherwise be condemned by the equal protection clause of the fourteenth amendment; i.e., that despite its different wording, Title VI was meant to provide that institutions receiving federal funds were forbidden from using a racial double-admission standard if, but only if, such a use would constitute a denial of "equal protection."

One of these five Justices, Mr. Justice Powell, concluded that the Davis plan did violate the equal protection clause (and thereby Title VI as well), thus ultimately placing his vote with the four Justices already holding in Allan Bakke's favor strictly on the basis of Title VI alone. Because Justice Powell concluded that race could be considered, albeit in a different fashion than it has been used at Davis, however, he voted to reverse that part of the California Supreme Court judgment forbidding any use of race. The other four Justices joined in an opinion written by Mr. Justice Brennan, concluding that the Davis plan did not violate the equal protection clause (and thus also did not violate Title VI), resulting in their decision to dissent.

In addition to these three principal opinions, there were three others. Mr. Justice White, while fully concurring in Brennan's opinion (on the merits of the constitutional issue) wrote separately to record his view that the provision is Title VI could not serve to support a private cause of action; rather, in his view, loss of federal funds was the only sanction contemplated by Congress. Mr. Justice Blackman fully concurred in Brennan's opinion, but added separate remarks of his own as to why, in his view, the Davis plan did not deny Allan Bakke the equal protection of the laws. Mr. Justice Marshall, also fully concurring in Brennan's opinion, added still more elaborate remarks of his own, defending the constitutionality of the Davis Plan. More graphically, one correct perspective of the case is shown in the chart at right.

The Obvious Instability of the Decision

Whether anyone other than Allan Bakke will hereafter succeed in challenging racial preferential admission programs, or whether many may succeed in doing so, is utterly uncertain. Some of the reasons for this uncertainty are obvious, others far less obvious.

Among the obvious reasons are these. First, since four of the Justices on the prevailing side reached their conclusion solely on the basis of a strict "colorblind" interpretation of Title VI which, however, a majority of the Court in fact rejected in the same case, there is no reason to believe that any of these Justices would necessarily insist upon their minority interpretation of Title VI in any subsequent case. A majority of the Court has said that the provision in Title VI does no more than forbid whatever uses of racial classifications are otherwise forbidden by the fourteenth amendment; that interpretation being the prevailing one in the Bakke case itself (so far as the statute was concerned), it would be entirely proper for any or all of the Justices holding a contrary view in Bakke henceforth to acquiesce in that construction.

Insofar as that may happen, then in even a case literally identical to the Bakke case (i.e., a case involving the very same kind of dual admission process as that which Davis used), Justices Stevens, Stewart, Rehnquist, and Burger may each, for the first time, have occasion to state their own view as to whether such an affirmative action plan is, or is not, compatible with the fourteenth amendment (and, by the same token, consistent also with Title VI). If but one of the four asserts a view more nearly in agreement with Brennan's opinion in Bakke, rather than more nearly in agreement with Powell's opinion in Bakke, the result in this, a case literally the same as Bakke would change: from five-to-four, to four (or fewer)-to-five (or more).

Second, there may be some public colleges or universities which, because they are state schools, are of course bound by the fourteenth amendment—but not bound by Title VI insofar as they provide no "program or activity receiving Federal financial assistance" to which the restrictions of Title VI apply. As to them, there being no Title VI basis upon which Justices Ste-
therefore be affirmed without gratuitous speculation as to whether, in the absence of that controlling Act of Congress, some other applicable law or constitutional provision would require the same result.

The remaining five Justices concluded, however, that the Act of Congress was not conclusive per se. Rather, all of them interpreted Title VI to forbid only such uses of race as would otherwise be condemned by the equal protection clause of the fourteenth amendment; i.e., that despite its different wording, Title VI was meant to provide that institutions receiving federal funds were forbidden from using a racial double admission standard if, but only if, such a use would constitute a denial of "equal protection."

One of these five Justices, Mr. Justice Powell, concluded that the Davis plan did violate the equal protection clause (and thereby Title VI as well), thus ultimately placing his vote with the four Justices already holding in Allan Bakke's favor strictly on the basis of Title VI alone. Because Justice Powell concluded that race could be considered, albeit in a different fashion than it has been used at Davis, however, he voted to reverse that part of the California Supreme Court judgment forbidding any use of race. The other four Justices, joined in an opinion written by Mr. Justice Brennan, concluding that the Davis plan did not violate the equal protection clause (and thus also did not violate Title VI), resulting in their decision to dissent.

In addition to these three principal opinions, there were three others. Mr. Justice White, while fully concurring in Brennan's opinion on the merits of the constitutional issue) wrote separately to record his view that the provision in Title VI could not serve to support any of the Justices on the prevailing side reached their interpretation of Title VI which, however, a majority of the Court in fact rejected in the same case, there is no reason to believe that any of these Justices would necessarily interpret the provisions in Title VI in any subsequent case. A majority of the Court has said that the provision in Title VI does no more than forbid whatever uses of racial classifications are otherwise forbidden by the fourteenth amendment; that interpretation being the prevailing one in the Bakke case itself (so far as the statute was concerned), it would be entirely proper for any or all of the Justices holding a contrary view in Bakke hereafter to acquiesce in that construction.

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Second, there may be some public colleges or universities which, because they are state schools, are of course bound by the fourteenth amendment—but not bound by Title VI instead as they provide no "program or activity receiving Federal financial assistance" to which the restrictions of Title VI apply. As to them, there being no Title VI basis upon which Justices Ste-
ven, Stewart, Rehnquist, or Burger could rely (even assuming they would persist in this "colorblind" interpretation of Title VI in every case where Title VI was applicable), each might then be compelled to address the legality of a Davis-type plan solely on the basis of the fourteenth amendment. Again, as explained above, if any one of them agrees with Brennan's more permissive view of racial preferential admission programs, all plans at all such public institutions identified to the Davis plan in Bakke would be upheld.

Third, none of the Justices addressing themselves to the fourteenth amendment issue took the view that the equal protection clause requires strict colorblindness at social redress: i.e., that short-term favoritism of racial minorities not now fairly competitive with others for medical school admission is a wholly appropriate means of partial redress for disadvantages all persons identified as members of those minorities may have been made to endure, in some degree, solely because of their race. That the Davis plan, viewed strictly as a conscientious effort toward such redress, might be imperfect did not on that account make it unconstitutional.

Mr. Justice Brennan (and the three Justices concurring in his opinion) found this justification adequate per se to withstand the constitutional attack against fourteenth amendment complaint. Mr. Justice Powell disagreed—but not completely. Rather, what he said was:

The history of the Justices addressing themselves to the fourteenth amendment issue took the view that the equal protection clause requires strict colorblindness at social redress: i.e., that short-term favoritism of racial minorities not now fairly competitive with others for medical school admission is a wholly appropriate means of partial redress for disadvantages all persons identified as members of those minorities may have been made to endure, in some degree, solely because of their race. That the Davis plan, viewed strictly as a conscientious effort toward such redress, might be imperfect did not on that account make it unconstitutional.

In turn, Mr. Justice Brennan characterized "the central meaning of today's opinions" (clearly meaning not just his own but Powell's as well) in the following way:

"If, indeed, these passages represent the central meaning of today's opinions" (clearly meaning not just his own but Powell's as well) in the following way:

Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages race minorities by past racial prejudice, at least when appropriate findings have been made to judicial, legislative, or administrative bodies with competence to act in this area. [Emphasis added.]

In fact not be difficult to supply), the appropriate legislative predicate to sustain a Davis-type plan might well be laid. Indeed, it is not clear that the U. S. Board of Regents is itself precluded from doing so; that Board is a constitutional entity in California, quasi-legislative as well as administrative. At least so long as it confined itself to plausible findings of past inferior treatment of racial minorities within the University of California system itself (a matter it might, in Powell's words, be "in [a] position to make"), Davis-type plans might then be deemed "responsive to identified discrimination." At the legislative level, moreover, it is not clear that the "findings" (for which varieties of stare-authorized racial minority preference systems may be thought appropriate forms of redress) need necessarily be related to "constitutional or statutory violations" within California itself. After all, ours has been a highly mobile population, and it may not be in the least irrational to conclude that many blacks, Chicanos, and Indians, confined as they were to separate and inferior schools in many states prior to moving to California, reflect directly the handicaps unfairly resulting from such constitutional and statutory transgressions. Thus, should the Regents of the University of California or the General Assembly of that State wish to enter findings of mea culpa respecting California in particular, still it might be possible to create a sufficient record permitting reinstatement of Davis-type plans.

In certain other states, moreover, Mr. Justice Powell's requirement of a "record of administrative findings of constitutional or statutory violations" by an appropriate agency clearly in a position to make such findings necessary and sufficient to sustain Davis-type plans on a pure redress theory can obviously be satisfied. For decades after Plessy v Ferguson, for instance, it is demonstrable that in North Carolina the state operated separate and unequal schools. (We may tend to forget that, even among the four school systems involved in the original quartet of cases decided by the Supreme Court in 1896, three of them had been determined by the lower courts to be operating separate and unequal schools.) In brief, the "history and 'duals' there for those who deem it appropriate to use that
hierarchy for such purpose. So used, then again a plan identical to that at Davis may be deemed constitutional by at least five, or seven, of the same Court as that which decided in favor of Allan Bakke.

Finally, Mr. Justice Powell sided that racial preferential admission standards in public and in federally assisted private colleges may be continued even absent any adequate record relating the felt necessity for such a plan to prevent acts of discrimination against the racial groups to be favored. By coincidence, with but very slight modification, presumably the very plan held invalid in Bakke itself can readily be reinstated.

Justice Powell's opinion opens with an implied premise within the equal protection clause: "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." That is to say, however, that all such distinctions are forbidden. Rather, it is to say that "in order to justify the use of a suspect classification [race], a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose."

One such purpose, Powell suggests, is "the attainment of a diverse student body" insofar as the overall quality of education provided within "an institution of higher education" is, in part, a function of the heterogeneity of the participants themselves. In this sense, under some circumstances "race" may be as much a merit-plan (albeit an admission one) as economic background, geographic origin, work experience, college entrance examination scores, or any other characteristic. All such characteristics, in Powell's view, are "relevant" to the proper and important function of providing the fullest measure of quality education, or, at least, to the accomplishment of that purpose.

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background — whether it be ethnic, geographic, culturally advantaged or disadvantaged — may bring to a professional school of medicine experience, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

As a consequence, when racially indifferent standards of admissions are employed, such standards would tend to screen out persons whose absence may diminish the character and quality of the educational experience that it is the very function of the institution to provide, the school may take appropriate steps to admit a particular "race or ethnic background . . . a "plus" in a particular applicant's file," even as it may do so in respect to other according to their geographic background or some equally fortuitous but educationally germane consideration. In this sense, Mr. Justice Powell virtually acted upon the position urged in the AAUP amicus brief.

The resulting adjustments to the Davis plan implied by Justice Powell need not be very great. First, the plan must identify those characteristics (which may include, but presumably must not be restricted to, race) which, in its view, are educationally germane to a diverse student body. Second, it should review its (academic) admissions standards to determine whether, given the nature in which those standards may tend to eliminate all or nearly all persons having germane characteristics of a particular kind (race being one such characteristic), the standards should be modified to build in a sufficient "plus" for such applicants that a nontrivial number will show up in each entering class.

Third, there should be no terminal dual or triple admissions tracks of admission, but only one track within which applicants are considered — the suggestion being that a person in Bakke's position may well have acquired some "plus" of his own equivalent (albeit relating to a different quality) to some "plus" credited to another on racial grounds. Under these circumstances, "suspect qualifications [including any admissions but nonetheless educationally germane qualifications] would have been weighed fairly and competitively, and the plan would have to basis to claim of unequal treatment under the Fourteenth Amendment."

Looking back at the Davis plan, for comparison, several suggestions now seem obvious. First, since no significant numbers of blacks, Chicanos, or American Indians were admitted into the entering class when ethnic origin was left out of account entirely, doubtless a nontrivial "plus" value may once again be assigned to all applications presented by such applicants. (Since a nontrivial number of "Asians" who admitted into the entering class without benefit of any such "plus," however, continued assignment of such a "plus" on that basis presumably will lack adequate justification.) Second, in order that the plan pass muster as a bona fide "educational diversity" plan (and not merely a more doubtful, more narrowly based "racial diversity" plan), other kinds of attributes need to be identified and other applicants possessing such attributes to be given "plus" points of their own sufficient also to produce a nontrivial presence of persons with those attributes in each entering class. With these modifications, racial preferential admissions programs providing more favored treatment to ethnic minority students applying at predominately white institutions will evidently be deemed acceptable to not fewer than five Justices both under Title VI and under the fourteenth amendment. We may briefly summarize the "improbability of the Bakke case, then, as follows:

(a) If, in a case involving a public university but not involving Title VI, either Stevens, Stewart, Rehnquist, or Burger acquiesce in Mr. Justice Brennan's view of the fourteenth amendment which is already shared by three other Justices:

(b) If, in a case involving a public university subject to Title VI or a private university subject to Title VII, either Stevens, Stewart, Rehnquist, or Burger acqui-
esses in what is already a majority's interpretation of Title VI (i.e., that it forbids only what the fourteenth amendment forbids), and also sequences in Mr. Justice Brennan's view of the fourteenth amendment.

2. A Davis-type plan may also be upheld even in the absence of either condition noted above, assuming only that appropriate findings are provided by a competent judicial, legislative, or administrative source, relating the plan as an appropriate remedy for identified discrimination against racial minorities.

3. In the absence of any of the above, a university subject to Title VI and/or the fourteenth amendment may nonetheless take race into account as a "plus" factor under circumstances where such consideration is a necessary means of providing reasonable ethnic diversity within the student body, as one of several kinds of "nonacademic" diversity which it believes contribute to the overall educational excellence of the institution.

Two Countervailing Possibilities

Despite what has been said thus far, there are at least two grounds on which racial preferential admissions programs in private and public institutions may nonetheless be held illegal, even when remedied in keeping with Mr. Justice Powell's opinion. First, it must be borne in mind that in Bakke itself, the Supreme Court reviewed the case to reexamine the legality of the Davis plan solely in terms of federal, rather than state, laws. The Court passed only on the reconcilability of the plan with Title VI and with the fourteenth amendment; it did not rely on it, but neither did it disapprove the use made of it by the Superior Court. Rather, the state Supreme Court affirmed the decision of the Superior Court solely on the basis of its view of the fourteenth amendment—leaving utterly unsettled whether the Superior Court was also correct in interpreting the plan as an appropriate remedy for identified discrimination against racial minorities.

Similarly, the United States Supreme Court said nothing respecting the proper interpretation or application of that state constitutional provision. Indeed, in nearly all circumstances, the United States Supreme Court deems itself incompetent to decide such questions (i.e., doubtful questions respecting the meaning—as opposed to the federal constitutionality—of state law, including constitutional law). Rather, unless an interpretation by a state supreme court of a state constitutional provision brings that provision into conflict with some overriding federal law (or unless the state supreme court constructs a state constitutional provision as having the same meaning as a parallel provision in the federal constitution), the general practice of the United States Supreme Court is to refuse to review not only the state constitutional provision (which it has no expertise superior to that of the state's own highest court to interpret), but also the case itself. The reason for this general practice is quite plain and can be illustrated by reference to the Bakke case. If the Supreme Court of California were to hold that, regardless of what the fourteenth amendment would permit Davis Medical School to do in its use of race, the California Constitution commits the state and all of its instrumentalities to a strict "colorblind" standard, then that holding fully adjudicates the controversy, renders it gratuitous to address any other issue and puts a final end to the litigation.

The fact is therefore that institutions utilizing race as a factor which operates to deny to any person that which they might otherwise have been eligible or entitled to receive, may still confront separate restrictions arising from "mini-equal-protection clauses" in the constitutions of the states in which those public institutions are located. While it would be surprising if many such state constitutional provisions were construed in such a fashion, by no means would it be without precedent. In recent years, a number of state high courts (including most of all the California Supreme Court) have declined to read parallel state constitutional provisions as yielding only the same kind of "due process" or "equal protection" as the United States Supreme Court more conservatively interpreted those phrases in the fourteenth amendment. Ironically, Mr. Justice Brennan has himself written a lengthy article urging state supreme courts to take a more lively and independent view of the generally moribund subject of state constitutional law. It bears attention, then, that the possibility of such a development further complicates the post-Bakke era.

There is yet another countervailing possibility as well, to be sure so remarkable that indeed it may call down a full-throated cry: "The first thing we do, let's kill all the lawyers." Quite apart from the two federal sources of law relied upon by Allan Bakke (successfully, as it turned out), i.e., Title VI and the equal protection clause of the fourteenth amendment, there remain other federal statutes in the field. One of these is itself subject to no interpretation that it imposes a strict "colorblind" standard on all colleges and universities in determining admissions, whether those colleges are private (rather than public), and whether or not they are recipients of federal financial assistance. The statute (42 U.S.C. § 1981) reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

In 1968, a majority of the Supreme Court construed this
federal statute not simply to invalidate state laws dis-
sabling black persons from making enforceable agree-
ments (the statute dates from the Reconstruction era),
but to provide a private cause of action against private
refusals to contract with black persons when the refus-
ing party would have been willing to make the same
contract with a white citizen. In 1976, moreover, the
Supreme Court held that § 1981 is applicable to schools
in respect to their admissions policy, i.e., that a refusal
to admit a black person under circumstances where a
white citizen would be admitted denies to that black
person "the same right ... to make and enforce con-
tracts" (of matriculation). The cases in which these
matters were settled were Jones v. Alfred H. Mayer, Co.,
392 U.S. 409 (1968), and Runyon v. McCrary, 427

The case of most immediate significance, however, is
a third case which appears to hold that, despite its
wording, § 1981 is a "two-way street," i.e., that it
equally forbids racial discrimination against white
persons (and in favor of black persons) as it forbids racial
discrimination against black persons (and in favor of
white persons). The case is McDonald v. Santa Fe Trail
concluded (at p. 285):

"The Act was meant ... to provide discrimination in the
making or enforcement of contracts against, or in favor of,
any race.

Neither the Runyon case nor the McDonald case was
available when Allan Bakke's case was first filed, in
1974. Thus, it is not surprising that his complaint failed
to challenge the Davis plan under § 1981; quite apart
from the challenger brought under the California Con-
stitution, Title VI, and the Fourteenth Amendment.
Correspondingly, there is nothing the least remarkable
in the fact that the possible application of § 1981 to
racial preferential admission programs (whether of the
Davis type or of the more general, "diversity" type
approved by Mr. Justice Powell) was not dealt with in
Bakke.

The appearance of these cases plus the dictum by
Mr. Justice Marshall in the McDonald case does, none-
thless, raise one more issue of instability regarding the
uncertain implications of Bakke. Here, however, unlike
the possible state supreme court "clearly indicated" inter-
pretation of state constitutions (e possibility that I do
think is not a remote one), it is not likely that § 1981
would be applied with the full force of the Marshall
dictum in the McDonald case or, at least, not in a
manner forbidding "diversity" type plans approved by
Mr. Justice Powell. A careful reading of Mr. Justice
Powell's opinion will be convincing to any reader. I
think, that neither he nor the other three justices (in-
ecluding Marshall) would have included § 1981 in any fashion
so forcing any kind of admissions program not otherwise
coincident with his view of the equal protection clause.
The same may very well be true of Mr. Justice
Powell—especially as the kind of program he finds
constitutional is one that does not "favor" Nacks as a class,
but rather favors varieties of diversity of which ethic-
ity is but one (only when indifference to such matters
would otherwise result in an educationally less desir-
able (because unduly homogeneous) student body.
Even as to the four justices holding in favor of Bakke on
the strength of the plain meaning of Title VI, the very
different language of § 1981 yields so much plain mean-
ing here. Moreover, since a majority of the Court has
concluded (in favor of Bakke than § 1981) to permit federally assisted universities to
consider race in ways not forbidden by the Fourteenth
Amendment, it would be surprising if any of them were
now to conclude that § 1981 disallows what the
Fourteenth Amendment and Title VI alike are deemed
to permit. While one cannot be certain of the outcome,
if therefore seem unlikely that § 1981 will foresee admission policies derived from Mr. Justice Powell's
position—for such institutions as may wish to proceed
in that fashion.

Conclusion

This brief article is advisedly described as "a pre-
liminary report." It is purely expository, and it will
assuredly soon be overtaken by subsequent events. For
the time being, it may be the better part of wisdom to
attempt nothing larger than some uncertain, small, and
immediate conclusions. If the "past future" of other
landmark cases are any sort of reliable guide, one would
be quite foolish to try to serve any role more serious
than mere amanuensis to the Court: more often than
not, the actual future of each such case was utterly
different from what its most patient critics had sup-
posed. Frequently, the expanded (or diminished) uses
were strikingly different from anything one could con-
ceive (or see) in the original opinion. The reader may not think so now deceive (or at least, by hindsight), but this was
probably true of Brown v. Board of Education itself.
Assuredly it was true of Baker v. Carr, the original
reapportionment case, which gradually emerged with a
far more annexional future than was first implied by its
several opinions.

Often, "great" cases become so almost entirely be-
cause of some subsequent use, more ingrained than
faithful in its application of precedent. And nearly as
often, of course, seemingly "great" cases become for-
gotten citations—because of subsequent descriptions
which diminish them to the vanishing point. Perhaps a
good example of such a case (which I wager the reader
never heard of, and if it serves my point too well) is
Boyd v. United States, which Mr. Justice Brandeis once
called "a case that will be remembered as long as wild
liberty lives in the United States." See Note, The Life
and Times of Boyd v. United States (1880-1975), Nitch
Assn Law Review, 76 [1975], p. 186.)

Which way Bakke will go, therefore, is highly un-
determinate. In the meantime, the minimal propon-
tion fairly derived from the case is that racially separate
and unequal admissions policies in federally assisted
institutions of higher learning are generally forbidden.
Four justices have reached this conclusion on the basis of an implied congressional resolve pursuant to Title VI of the Civil Rights Act. Mr. Justice Powell locates it in the command of the Fourteenth Amendment. Additionally, however, he concludes that admissions policies structured in good faith, for the different and more limited objective of enhancing the quality of learning that is herein referred to as "liberty and leibfreiheit that are the essence of the academic enterprise, will not be foreclosed by a tight and binding pure standard that is otherwise to sustain the use of a "suspect classification." From this point of view, Mr. Justice Powell's restraint on self-generated university "affirmative action" plans merely applies to universities the same self-denying ordinance which universities have so often asked of legislatures. Institutions of higher learning that would, by their own practice, advertise the propriety of using their admissions standards for nonacademic objectives, may insist on legislative bodies quite ready to act generally on that kind of concern. Within the academy itself, more convincingly, it is enough to say that the premise wholly consistent with the Fourteenth Amendment that is also used to achieve a broader heterogeneity within a given student body. But logically, other than as a mere device to make it easier to police the integrity of a given plan, there seems to be little reason to add this requirement. If it is the educational pertinence of race that makes its "plus point" use sufficiently important to escape condemnation by the equal protection clause under the circumstances, surely that pertinence is not logically discerned simply because the other varieties of nonacademic attributes (e.g., age, geographic origin) were regarded in the same way. Even supposing that some may believe such other types of differences are at least equally germane in their own way (a matter itself not wholly susceptible to reasonable differences of opinion), it has not generally been a requirement of equal protection that government must address all parts of a given problem as a condition of addressing any part of that problem. To the contrary, the equal law is entirely the other way. In this respect, then, Mr. Justice Powell's requirements respecting the institutional use of race in achieving a reasonable degree of ethnic diversity contribute to the educational functions of the university may be unduly severe—and not explicable under the equal protection clause on which he relied.

For another, Mr. Justice Powell's reference to higher education may assume more than those in higher education are frankly able to show. The claim that ethnic diversity within a student body is important to the overall quality of the university is often asserted, highly plausible, almost certainly true—and yet extremely vulnerable. By no means have we undertaken to prove the claim in any fashion that would ordinarily be required to sustain the use of a "suspect classification." By no means are most institutions in a position to rationalize the particular number or percentage of ethnically diverse students they desire on such a basis, or to defend the degree of "plus point" emphasis given to this kind of diversity vis-a-vis other kinds. The atitude thus displayed in Mr. Justice Powell's analysis for the special relevance of race to the educational functions of unit utilities, while genuinely gratifying, is probably more generous than we might ourselves think constitutionally defensible if it were instead granted to noneducational public bodies.

Taken on broader terms still, moreover, the position is also vulnerable to the criticism that Robert Bork has offered. (Wall Street Journal, July 21, 1978, p. 6) Professor Bork finds it at least as plausible that in some circumstances a university could believe that education is more effective under conditions of genuine homogeneity and so count against applicants, among other factors, the fact of being black, female, Chicano, etc. Nobody supposes for a moment that such a policy, however sincerely adapted, would be shielded... from the Fourteenth Amendment. One need not read the Powell opinion as nearly so permissive a fashion, of course, precisely something more than the institutional assertion of a good-faith belief in such a proposition would surely be demanded. Still, even regarded
more moderately, Professor Bork has a strong point which underscores the weakness just noted: exactly what evidence are those of us who would grant "pluses" on the basis of race prepared to provide in demonstration that we have had evidence, and not just a good-faith belief, that ethnic diversity within a student body is educationally significant? If, moreover, Mr. Justice Powell's deference in higher education does indeed stand on a wholly neutral application of the equal protection clause, would he be prepared to sustain a system of "pluses" assigned to produce an ethnically homogeneous public college student body if that college furnished equivalently convincing evidence in the educational defense of its policy?

Deficient criticism such as these may more of which most doubters appear as the case is explored elsewhere. I think there is a constitutional issue that will indeed present extremely great problems in the aftermath of the Bakke case. The problem stated in terms of Mr. Justice Powell's own address to the proper constitutional standard, is this. Mr. Justice Powell treats all racial classifications (and not simply those disadvantageous to historically-disfavored groups, wherever that may include) as constitutionally "suspect." Accordingly, such classifications are to be sustained only if they survive "the most exacting judicial scrutiny," a standard ordinarily demanding that the public necessity for such a classification be more than merely reasonable—but that it be very great indeed. Yet, in this dispensation the Powell opinion provides to higher education, the purpose to be served, as important as education, the superintendence of the shifting, changing, but never-ending enrollment of students, the purpose to furnish a better learning environment for all of the students—a purpose not exactly overwhelming or even nationally compelling.

Dissecting in DeFunis v. Odegaard (410 U.S. 312, 320, 334, 343 [1973]), the preponderance to Bakke (discussed for supporting Mr. Justice Powell's majority position) Mr. Justice Douglas anticipated this problem and declared:

"The argument is that a "compelling," state-interest can only justify the racial discrimination that is practiced here. [The DeFunis case] involved state law school admissions policy quite similar to the one in Bakke."

"If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons for justifying their constitutional grievances, does not another constitutional grievance acquire an accordable quality?

That way of putting the matter, that there is "an accordable quality" built into the Supreme Court's superintendence of the shifting, changing, but nevertheless immense by government to us race in one way or another, describes the essence of the problem very well. There was, however, even as the Court itself noted, no party to the case nor even a single advocate prepared to sustain the view that "our constitution is color-blind" and does not permit any public authority to know the race of those entitled to be protected in the enjoyment of... civil rights, common to all citizens." (Mr. Justice Harlan, dissenting in Plessy v. Ferguson, 163 U.S. 312, 354, 359 [1896]). For the many, it is virtuously all such decisions that have characterized our history. The Supreme Court is evidently inclined even now to be deferential to that permissive view of the fourteenth amendment. Perhaps still another half-century from now we can say better whether that kind of opinion and that kind of deference were sound.


It may strike the reader as curious that the few critical remarks advanced in this article have been directed only to Mr. Justice Powell's opinion—despite the fact that the opinions written by Mr. Justice Brennan spoke for four times as many Justices and that those may be far more likely to become the prevailing view on the constitutional issue. I have no very good excuse for that omission, except that the view advanced by Mr. Justice Brennan was one which had been repeatedly put forward (and just as often criticized) elsewhere—a matter not true of Mr. Justice Powell's view, which therefore seemed worthwhile to examine here. Because I am reluctant to review still again all that has already been said and by others in urging upon the Court the view adopted by Mr. Justice Brennan (and Justices White, Marshall, and Blackmun), I think it is simply more appropriate to deal with it briefly, as an extended postscript. In that way, these few observations will carry no prejudice that they are either original or exhaustive.

If Mr. Justice Powell's opinion is properly subjected to the null criticism that at its edges, it has "an accordable quality," that difficulty is magnified in the vastly more presumptive standard of judicial review urged in the Brennan opinion. Here, the door is not merely kept for racial classifications: it is opened so wide that there may issue worldwide political licenses for racial quotas in nearly every avenue of public life. Essentially, the proposed constitutional standard is that the government may use racial double standards, wherever they are "designed to further remedial purposes." The scope of racial quotas which may be targeted pursuant to this test is evidently very broad. It may best be described in comparison with a much more limited use of such standards "for remedial purposes."

In his dissenting opinion in DeFunis, Mr. Justice Douglas noted that the use of standardized admission tests may work an inequity unfairness to minority applicants. It is entirely possible that a test instrument generally effective in forecasting the likelihood of students to do more or less well in a given field of graduate study may be ineffective (or at least less effective) in respect to identifiable ethnic cohorts within the total group. He suggested, therefore, that insofar as a given admissions criterion was favored in this respect, i.e., when applied indiscriminately to all students, utilize...
tion of different or supplemental criteria more responsive to identifiable subgroups would be wholly constitutional.

The use of such additional and/or different criteria for ethnic minority applicants, under such circumstances, would be "remedial" and yet not "discriminatory." They would be remedial of defects discovered to exist within the general test insofar as the indiscriminate application of that test to ethnic minorities could be shown "underpredict" their actual graduate school performance when admitted to the same curriculum and when examined on equal terms with all other applicants. They would not be discriminatory, however, insofar as the use of the different (or additional) criteria for ethnic minorities merely achieves the same degree of reliability of prediction for them as is already achieved by the general test as applied to all others. Indeed, in the DeFunis case itself, while wholly disapproving the University of Washington's "justifications" for its racial dual admission standards, Mr. Justice Douglas voted to remand the case—to provide the university with an opportunity to show that its racially differentiated standards were, if only by coincidence, defensible in these terms.

Unquestionably, racially explicit separate standards "designed to further remedial purposes" in this limited and specific sense, are clearly constitutional. Indeed, under at least one federal statute they are, in certain circumstances, already required as a matter of federal law. Thus, Title VII of the Civil Rights Act of 1964 (applicable to all employers of fifteen or more employees) has been construed to require that insofar as an employer's hiring or promotion standards tend in the first instance to exclude a disproportionate percentage of ethnic minority applicants, those standards must be re-examined to determine whether they are inadvertently "discriminatory." In the sense just explained. If they are, the employer must supplement them with, or substitute for them, criteria as separately validated in their application to minority applicants as are the criteria applied to other applicants.

At the same time, it is quite clear that "affirmative action" as such is both legal and constitutional when voluntarily undertaken by a public or private enterprise (including a college), even when not required to do so by the employer's hiring or promotion standards tend in the first instance to exclude a disproportionate percentage of ethnic minority applicants. Indeed, the legitimacy of such an approach is obvious: it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. It is the object of the arrangement in at least one important respect: the racial double standards are permissible not to remedy any defect inherent in the uniform application of a single admissions standard—but useful, rather, to furnish a cohort of less qualified students to fill a minimum-racial quota which the university deems to be appropriate in the amelioration of the national racial debt. Succinctly stated, it is the arrangement to inaugurate a limited example of race reparations pursuant to which a scarce public good is to be divided among racial groups, with applicants from "victimized" groups to be considered more positively as a means of redress for that antecedent victimization.

The effect of such arrangements is necessarily to displace certain persons from positions and from opportunities they would otherwise have filled but for which they are now rendered ineligible because they are (a) white and (b) not sufficiently better qualified than all other whites as to be safely beyond the discriminatory effect of the racial minority set-aside quotas. The theory, according to which it is thought reasonable to proceed in this fashion is that all persons for whom the racial set-asides are reserved are more deserving (whether or not substantially less qualified) than any person displaced by the arrangement in at least one important respect: the racial victimization—if not personally and directly (which need not be shown), then at least impersonally and indirectly (which may safely be assumed), through these three centuries of white racism in American history.

And so the opinion of Mr. Justice Brennan advances accordingly:

[It] is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great.

And thus:

True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—not less than their proportion of the California
population—of otherwise unrepresented qualified minority applicants.

Viewed head on, as a nexus aimed at the amortization of the national racial debt, without doubt there is much about the Davis plan that is plainly repugnant. For one thing, it represents a most peculiar view of apportioning the burdens of providing racial restitution. The "benefits" of that racism for which the Davis plan purports to make partial group restitution are diffused in the "right" enrichment of all white Californians insulating most certainly the engineers of this compensatory scheme, i.e., the (predominantly white) faculty and administration of the Davis medical school.

Yet the overwhelming majority of all such white persons give up nothing in contribution to the amortization of that debt. They pay no higher taxes, the faculty teach no greater loads, they supervise no larger number of students, they personally forego no perceivers or enrollments, and indeed may themselves even profit from their own plan—nascetur as it provides them with an enhanced sense of self-esteem and peer-group approval. Rather, the Davis plan presumes to impose 100 per cent of the "debt". It is to amortize on a hypothesis of impersonally chosen surrogates from whom admission-gate transfer payments are thus to be made.

The Allan Bakke and Marco DeFunis cases stand at odds.

There is, of course, no evidence that any of them benefited disproportionately (if indeed at all) from the racism it is now their exclusive distinction to epure; there is no evidence that any of them are better able to afford the cost than others. More likely persons than Bakke who came from a working-class family (his father was a postman) would surely include persons so cushioned by family connection that even exclusion from every medi­cal school is no lasting hardship—as Bakke was not (nor any other citizen or taxpayer or officeholder in California) pays anything. More likely persons than Bakke who came from a working-class family (his father was a postman). In brief, the Davis plan as an engine for apportioning the burdens of providing racial restitution is perfectly calculated to dissipate its entire impact on otherwise "marginal" white applicants, i.e., those from circumstances least profiting from the am­ortization racism in America and among the least able to pay that debt. So it is, too, in virtually every other area where like proposals are entertained—a matter perfectly well understood by them and quite adequately explaining the high degree of resentment that whites at the margin entertain to the noblest shuttle of Davis-type plans.

Yet Mr. Justice Brennan has a reply to those very objections, and perhaps he is quite right.

It was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admissions to Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, for pervasive racial discrimination, ap­propriate redress would have failed to qualify for admission even in the absence of Davis's special admissions program.

Viewed that way (and it is not an unreasonable way), the Davis plan itself is not flawed. Rather, it is a laudable and needed objective I have sought to raise still has any force, it is only an objective to the incompleteness of the system. What is "needed" is not the dismantling of the Davis plan, but rather its systematic imitation and duplication in every other area of public life as well. If an Allan Bakke would have failed to qualify but for the effects of past discrimination which explains the disproportionate failure of minority applicants to have done as well or better than he, it is overly likely that this is equally true not just at the margin of competition for access to the Davis medical school—but at the margin of competition for all jobs, for all government contracts, etc., including appointment to the Davis faculty (and competition for scarce space in the publication of articles in professional journals), everywhere for everything currently allocated by more standards of competitive excellence rather than such standards as uniformly modi­fied by compensatory racial minority set-asides.

The more noble "problem" (if there is a problem, for some do not see any) of the Brennan rationale, there­fore, is in its very daftness as an instrument to end racism in the United States. The law, even as the Supreme Court stated in Brown v. Board of Education, is a powerful educative source. It communicates: a sense of what is right, it instills habits of thought, quite apart from the coercion it may impose. In the Bakke case, the Brennan opinion is at pains to insist that although the Davis plan plainly favors less capable students over more capable students differentiated basic­ally by race, those to whom those transfer payments are made are not "stigmatized" by the censure of their special admission, and apparently they have no reason to feel "grateful." Far from being patronized, what they get is, rather, a matter of simple justice: a matter of just racial redress. They do not "take" from an Allan Bakke for such a view is itself rife with white racism. It unc­er-tly assumes that whites affected adversely by the plan had something properly to be thought of as "theirs." Davis has assured them that this is not so. Mr. Justice Brennan assures them that Davis is reasonable in saying so. If both are right, they are at least equally right in every other area and every other walk of life in America. In brief it is at once wrong and uncon­scionable not to provide systematic racial minority set-asides elsewhere, fixing target quotas to be filled by less
rigorous standards applicable only to disadvantaged racial minority persons, as an equitable and broadly distributed means of amortizing the national racial debt. Generalized as a standard of constitutional review, the maxim of the Davis plan is thus one that emphatically inculcates not colorblindness but extraordinary race-conscious restructuring of some indefinitely “transitional” social order by state and national systems replicating whole tiers of racial quotas. A plurality of four Justices of the United States Supreme Court thus finds congenial to the Constitution a theory of racial quotas and racial double standards quite sufficient to fuel a generation or more of ethnic politics under a Constitution which at last shall be construed “not to permit any public authority to know the race of those entitled to be protected in the enjoyment of civil rights, common to all citizens.” That the contemplation of this transitional society, with its established layers of racial quotas, could truly be thought by anyone as more likely to eradicate race-consciousness, racial politics, or racism in the United States than any other alternative available, and not itself to become a permanently entrenched feature in an utterly race-conscious America, seems to be perfectly remarkable. But I sincerely hope that I am wrong, because this view of the matter is on the very edge of becoming the prevailing view of what will pass as the enlightened application of “equal protection of the laws.”
Modern Equal Protection: A Conceptualization and Appraisal

Michael J. Perry *

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Except in the area of the law in which the Framers obviously meant the equal protection clause to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legis-

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